ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from York County
The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2013-001543

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THE STATE,

Respondent,

v.

HUBERT FLOYD BROWN, JR.,

Appellant.

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# FINAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUE ON APPEAL

Appellant's issue is not preserved for appellate review, but even if it is preserved, the trial court properly instructed the jury on attempted murder.

## STATEMENT OF THE CASE

A York County Grand Jury indicted Appellant for attempted murder and first-degree burglary. (R.p.264-265; R.p.267-268.) On July 9-11, 2013, Appellant proceeded to trial before a jury. David C. Cook, Esquire, represented Appellant, and Assistant Solicitor E.B. Springs represented the State. The jury found Appellant guilty on both charges. (R. p.258.) The Honorable John C. Hayes, III, sentenced him to two sentences of life without parole pursuant to § 17-25-45. (R. p.261-262.)

Appellant filed a timely Notice of Appeal and then filed an amended Notice of Appeal, dated July 31, 2013, upon the direction of this Court.

## STATEMENT OF FACTS

On June 8, 2012, Appellant went to the home of his friend and former coworker, Michael Mahoney, to confront him about Mahoney's keeping his job while Appellant had lost his, which led to Appellant punching Mahoney. (R. p.28, lines 3-8; R. p.31, lines 5-14; R. p.33, line 2-R. p.35, line 7.) They ended up wrestling on the ground. (R. p.35, lines 7-14.) While they were wrestling, Chris Calvert, who was living with Mahoney at the time, came up behind Appellant and hit him in the head with a gear shift to stop his attack on Mahoney. (R. p.71, line 21-R. p.73, line 1.) Appellant then grabbed a hatchet from the trunk of his vehicle and began chasing Calvert, telling him he was going to kill him. (R. p.74, lines 1-14.) At some point, Appellant put down the hatchet and got a machete out of his trunk and began to chase Calvert with it. (R. p.75, lines 5-10.) Appellant was bleeding profusely at this point, and Mahoney tried to convince him to go to the hospital. After threatening to kill both men, Appellant got in his car and started to drive away. (R. p.76, lines 10-19.) Mahoney and Calvert went inside Mahoney's house and began to clean themselves up in the bathroom, while Mahoney's wife called 911. (R. p.77, lines 2-12.) Suddenly, Mahoney's wife started screaming; Appellant was in the house with the machete. (R. p.77, lines 14-24.) Appellant swung the machete toward Calvert's head and Calvert threw his hand up. (R. p.78, lines 1-11.) The machete hit his hand, cutting his thumb off most of the way so that it was hanging by the skin. (R. p.78, lines 12-23.) When Deputy Mark Whitesides arrived on the scene in response to the 911 call, he talked to the witnesses and developed Appellant as a suspect. (R. p.19, line 18-R. p.20, line 4.) Police eventually arrested Appellant in Walterboro, and he was charged with attempted murder and first-degree burglary. (R. p.92, lines 3-4; R. p.93, lines 5-10; R.p.264-265; R.p.267-268.)

Appellant proceeded to trial before the Honorable John C. Hayes, III, and a jury. The trial judge gave the standard charges on reasonable doubt, burden of proof, and presumption of innocence, as well as a charge on guilty but mentally ill. (R. p.222, line 18-R. p.225, line 9; R. p.239, line 8-R. p.240, line 18.) When the trial judge instructed the jury regarding the attempted murder charge, he stated:

> A specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily injury. Intent means intending the results. Intent is something which actually occurs and it's something which is not accidental or voluntary.
>
> Intent may be shown by acts and conduct[] of the defendant and other circumstances from which you may naturally and reasonably infer intent. Evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injury may be considered in determining the intent with which the act was committed. Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully committed an act a natural tendency of which is to destroy another's life.

(R. p.233, line 25-R. p.235, line 11.) At the completion of the jury charges, defense counsel asked the trial judge to cure his charges regarding the defense of guilty but mentally ill. (R. p.246, lines 9-15.) The trial judge agreed and brought the jury back in for a curative instruction. (R. p.246, line 16-R. p.248, line 3.) The trial judge specifically asked defense counsel, "And that's all you have?" to which he replied, "That's it, Your Honor." (R. p.246, lines 24-25.)

Later, the jury sent a note requesting to be recharged on attempted murder. (R. p.249, lines 14-19.) The trial judge recharged attempted murder, again stating, "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit the serious bodily injury." (R. p.251, lines 21-23.) When the trial judge

asked whether there was anything from the State on the recharge, the following exchange took place:

> [The State]: The first time you charged this morning I was daydreaming and I wasn't daydreaming this time and I heard you say that only a general and not a specific intent for attempted murder is required. I think all attempts require[] a specific intent and I don't think the legislature has given us any leeway on that.
>
> The Court: Well that's what I've got in my charge and – A specific intent to kill is not an element of attempted murder. There must be a general intent to commit serious bodily injury.
>
> [The State]: I know it was general when we had ABWIK but when we went to attempted - -
>
> The Court: That's what I charged them earlier. If you find some law that says that that's not right, that's in my charge and it's in my charge under the heading of Attempted Murder under 16-3-29. I don't see a case cited. But you take exception to that part of the charge?
>
> [The State]: I'm just concerned because the way I was taught all attempts are specific intent. And so when we went from ABWIK which is a general intent to attempted murder I'm afraid maybe we kicked in a specific intent.
>
> The Court: You mean if I have a general intent to harm you and I harm Chris instead, or have a general intent to hurt everybody in here and the only person except Chris and he's the one I hurt and - -
>
> [The State]: Well that can be transferred intent.
>
> The Court: Well you're on the record for that.
>
> [The State]: All right.
>
> The Court: Anything?
>
> [Defense counsel]: **Nothing from the defense, Your Honor.**

(R. p.255, line 21-R. p.257, line 2.)

Ultimately, the jury found Appellant guilty on both charges, and Judge Hayes sentenced him to concurrent sentences of life without parole pursuant to § 17-25-45. (R. p.258, 261-262.)

## ARGUMENT

**Appellant's issue is not preserved for appellate review because he did not request a particular jury charge or object to the given charges, but even if it is preserved, the trial court properly instructed the jury on attempted murder.**

Appellant argues the trial court erred in instructing the jury that the charge of attempted murder does not require a specific intent to kill. However, because Appellant did not object to the given jury instructions or request a particular charge, this issue is not preserved for this Court's review. Even if preserved, the trial court gave proper jury instructions according to the current and correct law of South Carolina.

Issue Preservation

Appellant argues the trial judge erred in charging the jury that attempted murder does not require a specific intent to kill. However, at trial, Appellant raised no objection to this charge in any form or fashion. See State v. Avery, 333 S.C. 284, 296, 509 S.E.2d 476, 483 (1998) (holding when an appellant fails to object to a jury instruction, the issue is not preserved for appeal); State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985) (holding in order to preserve an objection to a jury charge, a defendant must object to the charge as given or request an additional charge when afforded the opportunity to do so); State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976) ("The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge."); State v. Todd, 264 S.C. 136, 139, 213 S.E.2d 99, 100 (1975) ("In cases too numerous to cite, . . . it has been held that the failure of a defendant to object to the charge as made or to request additional instructions, when the opportunity to do so is afforded, constitutes a waiver of any right

to complain of errors in the charge.") (citations omitted); see also Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection."). Because Appellant failed to object, the issue is not preserved for appellate review.

In a footnote, Appellant suggests the issue is preserved because the trial court considered it and ruled upon it. However, this suggestion ignores well-established error preservation requirements. The only party that brought up the issue was the State, and our preservation rules make it clear that the party appealing must have been the one to object. "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." State v. Brown, 402 S.C. 119, 125 n.2, 740 S.E.2d 493, 496 n.2 (2013) (emphasis added) (citing JEAN H. TOAL, SHAHIN VAFAI & ROBERT A. MUCKENFUSS, Appellate Practice in South Carolina 57 (2nd ed. 2002)). After the State commented to the trial court that specific intent was required, the trial court asked the State if it could "find some law that says that that's not right." At that point, defense counsel could have provided law to the trial court to support the claim that attempted murder required specific intent. However, he did nothing. Thus, no issue was "raised by Appellant."

Moreover, even if this Court accepts Appellant's notion that the State's comments regarding specific intent somehow qualified as an "objection" on behalf of Appellant, it is important to note the comments came after the trial court's recharge rather than in

response to the original jury charges. Thus, the "objection" was not made at the first opportunity. See Lundy v. Lititz Mut. Ins. Co., 232 S.C. 1, 10, 100 S.E.2d 544, 548 (1957) ("Appellant cannot now complain of the Court's repeating substantially the same instructions to which counsel failed to object when given an opportunity to do so."). Additionally, his argument that it would have been futile to make any "further objection" misconstrues the record. Appellant did not make *any* objection so he certainly could not have made a further one.

Merits

"Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id.

Even if this Court finds the issue was preserved, the trial court properly instructed the jury on attempted murder. "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (Supp. 2013). The trial judge stated in his instructions that specific intent is not an element of attempted murder, which is an accurate statement of the law.[1] The word "specific" is not used in the statute. Because jury charges must be read as a whole to determine if they are correct, the entire charge on intent must be considered. Although the trial judge stated that "specific" intent is not an element of the crime charged, he went over "intent" extensively:

[1] Indeed, the trial court's jury instruction came directly from the current version of the Criminal Charges Bench Book, which the judicial department updates each year and distributes to judges and that is now published on the S.C. Judicial Department's website. http://www.judicial.state.sc.us/juryCharges/GS%20InstructionsJune2013.pdf.

> Intent means intending the results. Intent is something which actually occurs and it's something which is not accidental or voluntary.
>
> Intent may be shown by acts and conduct[] of the defendant and other circumstances from which you may naturally and reasonably infer intent. Evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injury may be considered in determining the intent with which the act was committed. Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully committed an act a natural tendency of which is to destroy another's life.

(R. p.234, line 2-R. p.235, line 11.)

The standard jury instruction for attempted murder is based on State v. Foust, 325 S.C. 12, 15-16, 479 S.E.2d 50, 51-52 (1996), which is still good law in South Carolina.

> Although the cases indicate that **some** intent must be demonstrated before an accused may be convicted of ABIK, we do not believe they stand for the proposition that a **specific** intent to kill must be shown. We hold that it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder in this State. Accordingly, we hold that, in charging juries the law of ABIK, South Carolina trial judges should give a standard "intent" charge, but need not advise the jury that the defendant must have a **specific** intent to kill before he may be convicted of ABIK.

Id.

Even though Appellant did not object to any portion of the jury charges, he is not even arguing that the trial court erred in all its other instructions on intent. He only now objects to the trial judge saying that specific intent is not an element of attempted murder. When the whole charge on intent is considered, it is clear there was no prejudice to Appellant simply from the trial judge's statement that specific intent is not an element of attempted murder. Appellant argues he was prejudiced because if the jury had been told

it had to determine that Appellant had specific intent to kill in order to find him guilty of attempted murder, it may have acquitted. He contends there was ample evidence presented that he was operating under a delusion due to a traumatic brain injury and could not have had a specific intent to kill. However, due to the remainder of the intent language charged, the jury could still have considered: (1) whether his conduct was accidental or voluntary; (2) acts and conduct and other circumstances from which it could naturally and reasonably infer intent; (3) evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injury; and (4) whether Appellant voluntarily and willfully committed an act a natural tendency of which was to destroy another's life. As noted above, Appellant had no objection to these additional charges, either at trial or now on appeal. Based on the considerations regarding intent, the jury could certainly have found Appellant guilty based on his conduct, the weapons he used, and the injury to the victim.

Furthermore, Appellant's argument that the first-degree burglary conviction must be reversed along with the attempted murder conviction is utterly without merit. As the trial court pointed out in its jury instructions, there were many crimes Appellant may have intended to commit while inside Mahoney's house and any one of them would support a guilty verdict on the burglary charge. The different crimes presented were: (1) entering while armed with a deadly weapon; (2) entering to cause physical harm to someone; (3) entering using a dangerous object; (4) entering while displaying what appeared to be a knife; or (5) entering in the nighttime. (R. p.230, lines 20-R. p.231, line 20.) Therefore, Appellant's argument that the trial court erred in his instructing the jury that no specific intent is required for attempted murder has nothing to do with the jury's

finding Appellant guilty of first-degree burglary. There is no way to now determine what the jury based its finding on. Thus, the first-degree burglary conviction should stand on its own.

Appellant cites language from State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), in support of his argument, stating, "Attempted murder would require the specific intent to kill . . . ." Id. at 397, 532 S.E.2d at 285. Appellant then argues, "By charging the jury that specific intent to kill was not an element of attempted murder, the Trial Court incorrectly stated the law to the jury." (App. Br. 10.) To the contrary, Sutton did not make specific intent an element of statutory attempted murder because it was decided prior to the codification of the crime in 2010. Thus, the trial court's charge was not an incorrect statement of the law based on Sutton.

In sum, Appellant did not object to the trial court's jury instructions regarding attempted murder. Any comments by the State to the recharge regarding specific intent did not operate as an objection on the part of Appellant. Therefore, the issue is not preserved for appellate review. Regardless, the trial court properly charged the jury based on the current and correct law. Accordingly, this Court should affirm the trial court.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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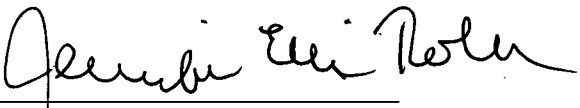
BY: 
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June 19, 2014

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**CERTIFICATE OF COUNSEL**

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The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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**PROOF OF SERVICE**

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I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
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I further certify that all parties required by Rule to be served have been served. This 19th day of June, 2014.

Angela Bennett

ANGELA BENNETT
Administrative Assistant

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